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AREL GUZMAN RODRIGUEZ

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE IRMA E. GONZALEZ)**

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, and PAUL STARITA,
ASSISTANT UNITED STATES ATTORNEY

PLEASE TAKE NOTICE that on Monday, April 28, 2008, at 2:00 p.m., or as soon thereafter as counsel may be heard, Arael Guzman Rodriguez by and through his counsel, Nancy Rosenfeld, will ask this Court to enter an order granting the motions listed below.

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1
2 **MOTIONS**
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4 The defendant, Arael Guzman Rodriguez, by and through his attorney,
5 Nancy Rosenfeld, pursuant to the Fifth, and Sixth Amendment to the United
6 States Constitution, the Federal Rules of Criminal Procedure 12(b)(1), 12(b)(3),
7 and 12(b)4), and all other applicable statutes, case law and local rules, hereby
moves this Court for an order to:

- 8 (1) Compel discovery/preserve evidence; and
9 (2) Grant the defense leave to file further motions.

10 These motions are based upon the instant motions and notice of
11 motions, the attached statement of facts and memorandum of points and
12 authorities, the attached exhibits, and any and all other materials that may come
13 to this Court's attention at the time of the hearing on these motions.

14 Respectfully submitted,

15
16 Dated: March 25, 2008

17 */S/ Nancy Bryn Rosenfeld*
18 NANCY BRYN ROSENFELD
19 Attorney for Defendant
20 Arael Guzman Rodriguez

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE IRMA E. GONZALEZ)**

UNITED STATES OF AMERICA, }
Plaintiff, }
v. }
AREAL GUZMAN RODRIGUEZ, }
Defendant. }
}
Criminal No. 06 cr 0640-IEG

**STATEMENT OF FACTS AND
MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF DEFENDANT'S MOTIONS**

STATEMENT OF FACTS AND CASE

On April 12, 2006, an indictment was filed against Arael Guzman Rodriguez, charging a violation of Title 8, United States Code, section 1324.

Prior to the filing of the indictment, the prosecution had provided some incident reports of Mr. Guzman Rodriguez's arrest in conjunction with a "fast track" offer. The reports reflect the following.

Arael Guzman Rodriguez, a Mexican citizen with no prior experience being in the United States, was observed driving a vehicle that had five undocumented immigrants in the back seat. The co-defendant, Misael Garcia Leon was in the

1 front passenger seat of the car. According to reports of interviews of the material
2 witnesses, Garcia Leon had guided them into the United States. They did not see
3 Mr. Guzman until he drove the car that they entered after arriving in the United
4 States.

5
6 I.
7

8 **THE COURT SHOULD COMPEL THE GOVERNMENT
TO PRODUCE DISCOVERY AND PRESERVE EVIDENCE.**

9 Arael Guzman Rodriguez makes the following discovery motion pursuant to
10 Rule 12(b)(4) and Rule 16. This request is not limited to those items that the
11 prosecutor has actual knowledge of, but rather includes all discovery listed below
12 that is "in the possession, custody, or control of any federal agency participating
13 in the same investigation of the defendant." *United States v. Bryan*, 868 F.2d
14 1032, 1036 (9th Cir.), cert. denied, 493 U.S. 858 (1989).

15 (1) Mr. Guzman Rodriguez's Statements. The government must disclose:
16 (1) copies of any written or recorded statements made by Mr. Guzman Rodriguez;
17 (2) copies of any written record containing the substance of any statements made
18 by Mr. Guzman Rodriguez in response to interrogation by a known government
19 agent; and (3) the substance of any statements made by Mr. Guzman Rodriguez
20 which the government intends to use, for any purpose, at trial. See Fed. R. Crim.
21 P. 16(a)(1)(A).

22 Mr. Guzman Rodriguez specifically requests any rough notes taken by any
23 agents of any alleged post-arrest statements. Under Federal Rule of Criminal
24 Procedure 16, the government is specifically required to produce "that portion of
25 any written record containing the substance of any relevant oral statement made
26 by the defendant whether before or after arrest in response to interrogation by
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any person then known to the defendant to be a government agent." Id. (emphasis added). In explaining the amendment, the advisory committee notes to the 1991 amendment to Rule 16 state:

The rule now requires the prosecution, upon request, to disclose any written record which contains reference to a relevant oral statement by the defendant which was in response to interrogation, without regard to whether the prosecution intends to use the statement at trial. The change recognizes that the defendant has some proprietary interest in statements made during interrogation regardless of the prosecution's intent to make any use of the statements.

The written record need not be a transcription or summary of the defendant's statement but must only be some written reference which would provide some means for the prosecution and defense to identify the statement.

Fed. R. Crim. P. 16 advisory committee's note.

As the plain language of the rule and the advisory committee notes make clear, five elements must be met for an item to be discoverable. First, the item must be a written record. Second, it must contain a reference to an oral statement made by the defendant. Third, the oral statement must be relevant. Fourth, the statement must be in response to interrogation by a government agent. Fifth, the defendant must know that the interrogator is a government agent. If any written record possesses these elements, it is discoverable.

An agent's rough notes of Mr. Guzman Rodriguez's statements clearly possess all five elements. First, the handwritten notes are obviously a written record. Second, they would contain references to oral statements made by Mr. Guzman Rodriguez. Third, Mr. Guzman Rodriguez's statements are certainly relevant as they directly bear on the critical events at issue in this criminal prosecution. Fourth, Mr. Guzman Rodriguez is only asking for notes of statements that were made in response to interrogation. Fifth, any person that interviewed Mr. Guzman Rodriguez after his arrest was obviously a known government agent. Thus, under the clear language of the rule, such rough notes

1 are discoverable.

2 Mr. Guzman Rodriguez maintains that any agents' rough notes of his post-
3 arrest statements are clearly discoverable under amended Rule 16(a)(1)(A). The
4 plain language of the amended rule and the commentary explaining the
5 amendment mandate such a result. It should be noted that when considering
6 Rule 16, even before the 1991 amendment, the Ninth Circuit endorsed "the view
7 that the defendant ought to be able to see his statement in whatever form it may
8 have been preserved in fairness to the defendant and to discourage the practice,
9 where it exists, of destroying original notes, after transforming them into
10 secondary transcriptions, in order to avoid cross-examination based upon the
11 original notes." United States v. Harris, 543 F.2d 1247, 1252 (9th Cir. 1976)
12 (emphasis deleted).

13 Finally, under the third category, the government is required to disclose the
14 substance of any "relevant oral statement made by the defendant whether before
15 or after arrest in response to interrogation by any person then known by the
16 defendant to be a government agent if the government intends to use that
17 statement at trial." Fed. R. Crim. P. 16(a)(1)(A). The government's intent to use
18 the statement at trial is read broadly -- it includes not only statements to be
19 introduced into evidence at trial but also statements used for impeachment
20 purposes. See Fed. R. Crim. P. 16 advisory committee's notes ("[T]he
21 prosecution must also disclose any relevant oral statement which it intends to use
22 at trial, without regard to whether it intends to introduce the statement. Thus, an
23 oral statement by the defendant which would only be used for impeachment
24 purposes would be covered by the rule."). Mr. Guzman Rodriguez requests that
25 the substance of all such statements be produced immediately. Mr. Guzman
26 Rodriguez asks that the Court prohibit the use at trial of any such statements that
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1 are not produced pursuant to this request. See Fed. R. Crim. P. 16(d)(2) (the
2 court may “prohibit the party from introducing evidence not disclosed, or it may
3 enter such other order as it deems just under the circumstances”).

4 (2) The Defendant's Prior Record. Mr. Guzman Rodriguez requests
5 disclosure of his prior record, including any prior arrest reports, probation reports
6 or any other documents relating to such record . He also requests any prior
7 immigration record. See Fed. R. Crim. P. 16(a)(1)(B). Mr. Guzman further
8 requests the same information as it relates to any co-defendants.

9 (3) Documents and Tangible Objects. Mr. Guzman Rodriguez requests the
10 opportunity to inspect, copy, and photograph all documents and tangible objects
11 which are material to the defense or intended for use in the government's
12 case-in-chief or were obtained from or belong to him. See Fed. R. Crim. P.
13 16(a)(1)(C). This request specifically includes the defendant's immigration file
14 and any material witness' immigration files.

15 (4) Reports of Scientific Tests or Examinations. Mr. Guzman Rodriguez
16 requests the reports of all tests and examinations which are material to the
17 preparation of the defense or are intended for use by the government at trial. See
18 Fed. R. Crim. P. 16(a)(1)(D). Mr. Guzman Rodriguez notes that no fingerprint
19 analyses have been produced. If such tests exist, Mr. Guzman Rodriguez
20 requests such discovery.

21 (5) Expert Witnesses. Mr. Guzman Rodriguez requests the name and
22 qualifications of any person that the government intends to call as an expert
23 witness. See Fed. R. Crim. P. 16(a)(1)(E). In addition, Mr. Guzman Rodriguez
24 requests written summaries describing the bases and reasons for the expert's
25 opinions. See id. This request specifically includes any fingerprint experts.

26 (6) Brady Material. Mr. Guzman Rodriguez requests all documents,
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1 statements, agents' reports, and tangible evidence favorable to the defendant on
2 the issue of guilt or punishment. See Brady v. Maryland, 373 U.S. 83 (1963).
3 Impeachment evidence falls within the definition of evidence favorable to the
4 accused, and therefore Mr. Guzman Rodriguez requests disclosure of any
5 impeachment evidence concerning any of the government's potential witnesses,
6 including prior convictions and other evidence of criminal conduct, including
7 immigration records. See United States v. Bagley, 473 U.S. 667 (1985); United
8 States v. Agurs, 427 U.S. 97 (1976). In addition, Mr. Guzman Rodriguez requests
9 any evidence tending to show that a prospective government witness: (I) is
10 biased or prejudiced against the defendant; (ii) has a motive to falsify or distort
11 his or her testimony; (iii) is unable to perceive, remember, communicate, or tell
12 the truth; or (iv) has used narcotics or other controlled substances, or has been an
13 alcoholic.

14 (7) Request for Preservation of Evidence. Mr. Guzman Rodriguez
15 specifically requests the preservation of all physical or documentary evidence
16 that may be destroyed, lost, or otherwise put out of the possession, custody, or
17 care of the government and which relate to the arrest or the events leading to the
18 arrest in this case. This request includes the tape recording of any deportation
19 proceeding relied upon by the government.

20 (8) Any Proposed 404(b) Evidence. "[U]pon request of the accused, the
21 prosecution . . . shall provide reasonable notice in advance of trial . . . of the
22 general nature" of any evidence the government proposes to introduce under
23 Rule 404(b). Fed. R. Evid. 404(b). Mr. Guzman Rodriguez requests such notice
24 at least three weeks before trial in order to allow for adequate trial preparation.

25 (9) Witness Addresses. Mr. Guzman Rodriguez requests the name and
26 last known address of each prospective government witness. He also requests

1 the name and last known address of every witness to the crime or crimes charged
2 (or any of the overt acts committed in furtherance thereof) who will not be called
3 as a government witness.

4 (10) Jencks Act Material. Mr. Guzman Rodriguez requests production in
5 advance of trial of all material discoverable pursuant to the Jencks Act, 18 U.S.C.
6 § 3500. Advance production will avoid needless delays at pretrial hearings and
7 at trial. This request includes any "rough" notes taken by the agents in this case;
8 these notes must be produced pursuant to 18 U.S.C. § 3500(e)(1). This request
9 also includes production of transcripts of the testimony of any witness before the
10 grand jury. See 18 U.S.C. § 3500(e)(3). Jencks statements must be produced at
11 a suppression hearing. See Fed. R. Crim. P. 12(i) and 26.2(g). Mr. Guzman
12 Rodriguez requests production of such material before any suppression hearing
13 in order to avoid delay at the hearing, as would be permitted pursuant to Rule
14 26.2(d).

15 (11) Informants and Cooperating Witnesses. Mr. Guzman Rodriguez
16 requests disclosure of the names and addresses of all informants or cooperating
17 witnesses used or to be used in this case. The government must disclose the
18 informant's identity and location, as well as disclose the existence of any other
19 percipient witness unknown or unknowable to the defense. Roviaro v. United
20 States, 353 U.S. 52, 61-62 (1957). Mr. Guzman Rodriguez also requests
21 disclosure of any information indicating bias on the part of any informant or
22 cooperating witness. Giglio v. United States, 405 U.S. 150 (1972). Such
23 information would include what, if any, inducements, favors, payments or threats
24 were made to the witness to secure cooperation with the authorities.

25 (12) Evidence of other unlawful immigrant smuggling: Mr. Guzman
26 Rodriguez requests any and all evidence upon which the government bases any

1 claim that Mr. Guzman Rodriguez is involved in other smuggling behavior or has
2 contacts with other immigrant smugglers.

3 (13) Residual Request. Mr. Guzman Rodriguez intends by this discovery
4 motion to invoke his rights to discovery to the fullest extent possible under the
5 Federal Rules of Criminal Procedure and the Constitution and laws of the United
6 States. Mr. Guzman Rodriguez requests that the government provide him and his
7 attorney with the above requested material sufficiently in advance of trial.

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10 **III.**

11 **THE COURT SHOULD GRANT LEAVE TO FILE FURTHER MOTIONS.**

12 Mr. Guzman Rodriguez asks leave to file further motions in the event
13 further discovery gives rise to the need for further pre-trial proceedings.

14

15 **CONCLUSION**

16 For the foregoing reasons, Mr. Guzman Rodriguez respectfully requests
17 that the Court order the government to produce discovery and preserve
18 evidence, and grant leave to file further motions.

19

20 Respectfully submitted,

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22 Dated: March 25, 2008

23 */S/ Nancy Bryn Rosenfeld*
Nancy Bryn Rosenfeld,
Attorney for Mr. Guzman Rodriguez